UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 594

Case No. 649: DEL ROSARIO-SANTOS Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen, Vice-President; Mr. Ioan Voicu;

Whereas at the request of Veronica del Rosario-Santos, a staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, successively extended to 27 December 1991 and 31 January 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 January 1992, the Applicant filed an application requesting the Tribunal:

"...

5. (1) To declare the present appeal receivable.

(2) To find that the Joint Appeals Board erred by introducing extraneous factors into its consideration of the Applicant's appeal.

(3) To adjudge that UNICEF, in selecting the candidate to fill the post of Assistant to the Associate Director did not adhere to UNICEF Administrative Instruction No. 352, that UNICEF misapplied the guidelines and that UNICEF failed to comply with staff regulation 4.4.

(4) To declare that UNICEF circumvented a fair review of qualified candidates by the Appointment and Placement Committee.

(5) To adjudge and declare that the Applicant was denied due process due to procedural irregularity in the selection process.

(6) To find that there was prejudice against the Applicant caused by procedural mistake.

(7) To find that the Applicant was treated in an arbitrary manner which precluded her selection as the successful candidate for the post.

(8) To order the Respondent to pay the Applicant damages in the amount of two years of net salary, for violation of the terms of her permanent appointment, for lack of due process and for prejudice against the Applicant.

(9) To order the Respondent to assign the Applicant a post and grade equivalent to the post of Assistant to the Associate Director of the Programme Division of UNICEF."

Whereas the Respondent filed his answer on 20 October 1992;

Whereas the Applicant filed written observations on 15 January 1993;

Whereas, on 27 January 1993, the Respondent submitted an additional statement;

Whereas, on 10 May 1993, the Applicant submitted an additional document and amended her pleas as follows:

"(9) to order the Respondent to pay the Applicant damages in the amount of two years of net salary, for exemplary moral damages, including punitive damages."

Whereas, on 19 May 1993, the Respondent commented on the Applicant's amended pleas;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 11 May 1972, as a Stenographer. She was initially offered a fixed-term appointment at the G-2 level, until 11 August 1972, when she was granted a probationary appointment. On 1 May 1974, the Applicant's appointment was converted to a regular appointment. During the

course of her employment with UNICEF, the Applicant received successive promotions, reaching the G-6 level from 1 January 1985, with the functional title of Programme Assistant.

On 4 September 1990, the Division of Personnel issued a Vacancy Announcement for the P-2 level post of Assistant to the Associate Director. The Applicant and seventeen other candidates, internal and external, applied for the position.

On 23 October 1990, the Director of the Programme Division, transmitted to the Division of Personnel his assessment of the qualifications of the candidates, short-listing four candidates. The Applicant ranked third in the short-list.

According to the record, a Selection Advisory Panel (SAP), consisting of a representative of the Appointment and Placement Committee (APC), together with a representative of the Division of Personnel and a representative of the Programme Division, met on 30 October 1990, to consider the applications for the post. After reviewing the qualifications of the four short-listed candidates, the Panel unanimously recommended that the candidate ranked first by the Director of the Programme Division be appointed to the post. As regards the Applicant, the SAP noted that although "she has shown a good performance; however, she does not match the academic qualifications nor the field of experience that the previous candidate has." The candidate chosen by the SAP had joined UNICEF as a Junior Professional Officer in 1988. After working on a short-term basis for the Accounts Section, she had been granted a fixed-term contract in the Programme Division, as Assistant to the Associate Director, at the P-2 level. According to the record, the recommendations by the SAP were not forwarded to the APC. On 5 November 1990, the Executive Director approved the appointment of the candidate endorsed by the SAP. On 30 November 1990, the Applicant requested the Secretary-General to review this decision.

In a reply dated 9 January 1991, the Deputy Executive Director, on behalf of the Executive Director, informed the Applicant that the decision would be maintained.

On 11 February 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 13 September 1991. Its conclusion and recommendations read as follows:

"Conclusion and Recommendations

27. The majority of the Panel concludes that the rules concerning appointments and placement had not been applied consistently in the case under consideration, which had had the effect of denying the Appellant a full review of her candidature by her peers, i.e., the Global APC.

28. Accordingly, the majority of the Panel recommends that the Appellant be given priority consideration for any appropriate core post vacancy at the P-2 level for which she is found to be qualified and in which she is interested.

29. The majority of the Panel also recommends that the Appellant receive three months pay at the P-2 level for the injury she suffered as a result of the Administration's failure to review her candidature thoroughly and equitably in accordance with existing rules."

In a dissenting opinion, the Chairman of the JAB panel stated in part:

"...

2. The Panel having rejected other claims by the Appellant, rightly focused its attention on the question whether in the selection process UNICEF had breached established procedures and policies regarding appointments, promotions and lateral transfers. In this regard the Panel had to deal with the difficult problem of separating its examination of the Appellant's grievances from any consideration which would be tantamount to questioning the manner in which another candidate arrived at the stage where she was subsequently selected for the post. The issue was whether the Respondent by-passed the Appointment and Placement Committee (APC), thus denying the Appellant due process, and not how the other candidate was selected for the post.

3. Except for the minutes of the Selection Advisory Panel (SAP) which the Panel requested and received from the Respondent, the Panel was deprived of its responsibility to independently seek and review all relevant confidential documents, including, if necessary, the employment records of all the candidates for the post. Regrettably, the Appellant had access to and provided as attachments to her statement of appeal, the Personnel Action (P.5) documents of another staff member. As noted in paragraph ... above, the Panel expressed its concern at this apparent breach of confidentiality and infringement on the rights of the selected candidate.

4. It is clear that while purporting to be concerned about the alleged by-passing of the APC, the Appellant dwelt at length on the qualifications and suitability of the selected candidate for the post in question. She stated, inter alia, that:

> '... The selected candidate's work experience with UNICEF is limited to financial accounting of programme accounts and does not include any practical experience whatsoever in programming work... The Appellant questions the criteria used in the selection in the light of consideration that the selected candidate did not even fulfil the minimum requirements. One consideration, however, appears to have been that of nationality. The selected candidate is from a major donor country of UNICEF, while I am from a developing country...'.

5. If indeed there was a breach of the selection process outlined in paragraph ... above, which in my view there was not, the Appellant should, as far as possible, have limited her arguments to the selection process and procedure without direct reference to qualifications, personnel history and nationality of any other candidate. In these circumstances, it would be injudicious for the Panel to make any recommendation in support of this appeal, let alone a recommendation for remedies, including financial on behalf of the Appellant.

6. Accordingly, I recommend that this appeal be rejected."

On 26 September 1991, the Director of the Office of the Under-Secretary-General for Administration and Management informed the Applicant that:

> "The Secretary-General has re-examined your case in the light of the Board's Report, including the minority opinion. He wishes first to note that he shares the Panel's unanimous concern at the breach of confidentiality regarding the selected candidate. With regard to your appeal, the Secretary-General has concluded that you were given full and fair consideration for the post in question in accordance with UNICEF's established procedures. Accordingly, he has decided that the contested decision be maintained. However, in view of your very good performance record, you should be given full consideration for higher level posts in UNICEF for which you are found to be qualified and in which you may express an interest."

On 31 January 1992, the Applicant filed with the Tribunal the application referred to earlier.

The Applicant separated from the service of UNICEF with effect from 30 April 1993.

Whereas the Applicant's principal contentions are:

1. The Respondent inconsistently applied the rules concerning appointments and placement, denying the Applicant due process of law.

2. The Respondent arbitrarily transferred another staff member to the post sought by the Applicant, circumventing normal procedures, and by-passing review by the APC in order to give preferential treatment to another candidate.

3. The JAB erred when it introduced the extraneous issue of confidentiality into its consideration of the appeal.

Whereas the Respondent's principal contentions are:

1. Any part of the application that relies on documents improperly obtained and disclosed, should be stricken and disregarded by the Tribunal.

2. The Applicant was properly considered for promotion and therefore her non-selection for the post does not violate her rights.

3. The Applicant has not discharged the burden of proof to establish that her non-selection for the post in question was improperly motivated.

The Tribunal, having deliberated from 14 June to 28 June 1993, now pronounces the following judgement:

I. The Applicant's complaint centers on "violations of the terms of her permanent appointment", lack of due process, and prejudice against her, for which, initially, at the time of her application, she requested payment of "damages in the amount of two years of net salary" and assignment to a "post and grade equivalent to the post of Assistant to the Associate Director of the Programme Division of UNICEF". On 10 May 1993, the Applicant informed the Tribunal that she had "resigned from the service of UNICEF effective 30 April 1993" and asked that her plea for an equivalent post and grade, be changed to read "to order the Respondent to pay the Applicant the amount of two years of net salary, for exemplary moral damages, including punitive damages".

II. The principal controversy between the parties is essentially about the procedure followed in selecting a candidate for the post of Assistant to the Associate Director at the P-2 level. The purpose of the post, as indicated in the Vacancy Bulletin issued on 4 September 1990, is:

> "To support and assist the Associate Director in co-ordinating the work of the Geographical Sections, take part in reviews of annual reports and programme submissions, the Division's workplan, and follow-up with field offices on the implementation of programme policies and procedures."

The minimum requirement for candidates is described as follows:

"- University degree or equivalent in social science or related discipline. Hands-on knowledge of computer applications required.
- At least two years of progressive and diversified knowledge of UNICEF programme policies and procedures and experience in their application.
- Fluency in English. Knowledge of French and Spanish an asset".

III. The Applicant contends that under the "guidelines" circulated by the Respondent on 2 May 1983, the "Appointment and Placement Committee (APC) will review the recommendations of the Selection Advisory Panel" (SAP) and inasmuch as this was not done, the Applicant was the victim of an improper procedure. The Respondent, on the other hand, asserts that the established procedure was correctly followed and that Personnel Administration Management Manual, Chapter 4, Section 4, paragraphs 4.4.7 and 4.4.8 provides that, "for appointments of existing staff members to vacant posts at the same level as their own personal grade, provided there is consensus in the SAP", the SAP's recommendation has to be sent to the Director of Personnel and not to the APC.

IV. The details furnished, both by the Applicant and the Respondent, in support of their positions have been considered by the Tribunal. It appears to the Tribunal that there was some confusion, resulting from the way it was described, about the status of the successful candidate. That candidate was already at the same level as the post advertised and whether or not her appointment could be considered strictly as a lateral transfer, is immaterial. The successful candidate was entitled to be considered for the post, along with sixteen other applicants, because she was a former Junior Professional Officer (JPO) serving at the time on short term fixed contracts. In section 5.3.56 of the UNICEF Personnel Administration Manual - Vol. 1, it is stated that: "JPOs, like qualified applicants from any UN member state, are eligible to

compete with internal candidates for vacant UNICEF international project or core posts, when they complete their term of duty". The fact that the successful candidate was occupying the post advertised, has little significance in the system followed by UNICEF.

V. As indicated above, different views have been taken with respect to the "guidelines" in force for filling the advertised post. The Applicant asserts that it was necessary for the SAP to send its recommendation to the APC in the first instance. On the other hand, the Respondent maintains that, since there was a consensus in the SAP, its recommendation in the present case, could be sent directly to the Director of Personnel. The Tribunal finds that the Respondent followed established practice, while bearing in mind the main consideration, that the best candidate available should be selected for any post. There was consensus in the SAP about who was the best candidate. On 9 January 1991, in explaining the position fully to the Applicant, the Deputy Director (Operations) wrote to her, inter alia, that:

> "On 30 October 1990, a Selection Advisory Panel consisting of a representative from the Office (PD[Programme Division]), from DOP and from the APC was held at which time all shortlisted candidates were reviewed. As you were one of the shortlisted candidates, the SAP carefully reviewed your candidature. The SAP unanimously agreed to the selection of another applicant as the best suited for the post.
>
> On 5 November 1990, the Deputy Director, DOP approved the appointment of this other candidate. You were subsequently advised by letter on the same day of this selection."

VI. The Applicant is entitled to evaluate her own achievement and performance in any way she wishes (in spite of nemo judex in sua

causa), but the assessment of candidates for posts is a responsibility within the lawfully exercised discretion of the Respondent. Neither the Tribunal (nor the JAB, as indicated in its report) can substitute its evaluation for that of the Respondent.

VII. The inclusion of the Applicant among the four candidates short-listed by the supervisor of the Department, shows that her candidature was weighed and assessed before it was reviewed by the SAP. This satisfies the Tribunal that the selection process was proper. The Applicant's suggestion that she has been a victim of a flawed procedure, to the extent of being excluded as a result of some arrangement made in advance, cannot be sustained.

VIII. The Tribunal, having rejected charges of wrong-doing on the part of the Respondent in applying the prescribed procedure, now turns to allegations of prejudice and discrimination the Applicant makes against the Respondent. She asserts that the General Assembly resolutions regarding the advancement of women, especially women from developing countries, were not adhered to. There is not one iota of evidence this was so. Accordingly, the Tribunal is unable to sustain these allegations.

IX. The Applicant also alleges that by not selecting her for the advertised post, the Respondent failed to "provide occupational training opportunities ... to enable women in low-ceiling occupations to choose more promising careers". This complaint is also without substance as the Administration repeatedly recognized and appreciated "years of service and your contribution to UNICEF". On 26 September 1992, the Director, Office of the Under-Secretary-General for Administration and Management, indicated - on behalf of the Secretary-General - in a letter written to the Applicant that

"in view of your very good performance record, you should be given full consideration for higher level posts in UNICEF for which you are found to be qualified and in which you may express an interest".

X. The Tribunal must record its strong disapproval of one aspect of the presentation of her case by the Applicant. The JAB has found and the Respondent has confirmed that the Applicant used documents from another staff member's personnel file, in "breach of confidentiality". In support of her action, the Applicant maintained that she was not aware of the appropriate instruction prescribing "that official files should not be removed from the personnel offices, and that only the staff members concerned and authorized officials could have access to those files". The Applicant went on to explain that she presented the confidential material as "all available evidence must be presented" to the Tribunal and that "the Administration cannot hide behind the issue of confidentiality".

The privacy of a staff member's personnel file is so self-evident as to require no further elaboration by the Tribunal. Hence, the Tribunal cannot accept these explanations for the infringement of rules of confidentiality, especially as there are provisions in the Tribunal's Statute and Rules for obtaining such material as may be needed for the proper consideration of a case. Besides, the Applicant, having served with UNICEF for about twenty years, must be presumed to have known the observance, in practice, of the confidentiality of personnel files, even if she was not aware of the precise instructions relating thereto. The Tribunal wishes to alert all applicants who may come before the Tribunal in the future, that the acquisition, use or introduction of unauthorized confidential or privileged documents will be totally inadmissible, and any attempts to do so will meet with disapproval by the Tribunal and may have adverse consequences for the Applicant.

XI. In view of the foregoing, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Vice-President

Ioan VOICU
Member

Geneva, 28 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary